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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

GUY A. THOMPSON, Trustee, Missouri Pacific
Railroad Company, Debtor,
Petitioner,

v.

RECONSTRUCTION FINANCE CORPORATION et al.,
Respondents.

(And other cases as shown on page 1.)

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
for the Tenth Circuit.

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TITLES OF CASES
In Which This Petition Is Filed.

Guy A. Thompson, Trustee, Missouri Pacific
Railroad Company, Debtor,

Petitioner,

v.

The Denver and Rio Grande Western Railroad
Company et al.,

Respondents.

(Number 2906 below)

Same

v.

The Denver and Salt Lake Western Railroad
Company et al.,

Respondents.

(Number 2907 below)

Same

v.

City Bank Farmers Trust Company, Trustee,
et al.,

Respondents.

(Number 3106 below)

Same

v.

The Denver and Rio Grande Western Railroad
Company et al.,

Respondents.

(Number 3107 below)

Same

v.

Reconstruction Finance Corporation, Insurance Group Committee, Central Hanover Bank and Trust Company, Trustee, United States Trust Company of New York, Trustee, Guaranty Trust Company of New York, Trustee, and The Chase National Bank of the City of New York, Trustee,

Respondents.

(Numbers 2906, 2907,
3106, 3107, 3108 below)

PETITION FOR WRIT OF CERTIORARI

**To the United States Circuit Court of Appeals
for the Tenth Circuit.**

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, prays that a writ of certiorari issue to review the decrees of the United States Circuit Court of Appeals for the Tenth Circuit, entered May 10, 1945, reversing orders of the District Court for the District of Colorado, approving and confirming a Plan of Reorganization under Section 77 of the Bankruptcy Act for The Denver and Rio Grande Western Railroad Company (the debtor) and The Denver and Salt Lake Western Railroad Company (the subsidiary debtor).

Petitioner holds title to 150,000 (50 per cent) shares of the no par common stock, \$608,800 preferred stock, and \$1,000,000 of Refunding and Improvement Mortgage Bonds of The Denver and Rio Grande Western Railroad Company, by reason of which ownership the interest of petitioner will be materially and adversely affected if the Plan finally be made effective. The Interstate Commerce Commission held that the equities of the owners of the common

and preferred stock of the Debtor had no value, and denied to petitioner the right to participate in any Plan of Reorganization.

The District Court approved the Plan of the Commission. The United States Circuit Court of Appeals for the Tenth Circuit on appeal reversed the District Court, but held that no valuation based on any reasonable estimate of prospective earnings could be sufficiently large to pay the stockholders anything, and approved the finding of the Commission and the District Court that their claims are valueless and barring them from participation in the Plan.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is not yet reported.

The opinion of the District Court (Submission Pamphlet, Page 187) is not reported, except in C. C. H. Bankruptcy Law Service, at Paragraph 54562 and Paragraph 55008.

The reports of the Interstate Commerce Commission (Submission Pamphlet 29, 98, 113 and 151) are reported in 233 I. C. C. 515; 239 I. C. C. 583; 254 I. C. C. 5, and 254 I. C. C. 349.

JURISDICTION.

The decrees of the Circuit Court of Appeals were entered May 10, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Section 347).

QUESTIONS PRESENTED.

1. Whether the Interstate Commerce Commission (hereinafter called the Commission), in arriving at the value of the property of a railroad company undergoing reorganization, may give effect only to past earnings in arriving at the value of the property in question, and disregard

changed conditions, improvements to the property, and all other elements of value.

2. Whether, in determining the prospective earnings of the properties of the Debtor, present earnings may be disregarded and the equities of the stockholders be held to be without value because of diminished earnings during the years of national receding economy and depression.

3. Whether a finding that the equities of the stockholders are of no value can lawfully be made if there is a reasonable probability that earnings will be realized from which substantial dividends can be paid, even though only during periods of economic prosperity.

STATUTE INVOLVED.

The pertinent provisions of Section 77 of the Bankruptcy Act, as amended, 49 Stat. 911, c. 744, 11 U. S. C. A., Sec. 205, are attached hereto as Appendix 1.

STATEMENT.

The petition of the Debtor for reorganization under Section 77 of the Bankruptcy Act, as amended, was filed in the District Court for Colorado on November 1, 1935. After hearings in 1936 and 1937, the Commission approved a Plan of Reorganization which was disapproved by the District Court on March 7, 1941. Further hearing was held by the Commission in May, 1941, which was followed by further evidence taken at the District Court in 1942 and 1943. After hearings, the District Court approved the Plan on October 25, 1943, and after submission to creditors confirmed it on November 29, 1944.

The Debtor appealed from both these orders. The Petitioner appealed from the decree of the District Court entered November 29, 1944, confirming the Plan. All appeals were disposed of by the Circuit Court of Appeals in its Opinion and Decree of May 10, 1945.

REASONS FOR GRANTING THE WRIT.

Question 1.

Subsection (e) of Section 77 of the Bankruptcy Act, as amended, provides, in part, that—

“The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.”

In the cases of **Ecker v. Western Pacific R. Corp.** and **Institutional Investors v. Chicago, M. St. P. & P.*** it was held that in determining whether the equities of stockholders in railroad companies undergoing reorganization had or had not value, the issue involved in such a determination is whether there is a reasonable probability that the earning power of the road will be sufficient to pay prior claims of interest and principal and leave some surplus for the service of the stock; and it was also held that if it be established that there is no reasonable probability of such earning power, then the inclusion of the stock would violate the full priority rule of the **Boyd Case**.†

The question turns, then, on what must be considered in determining the future earnings of the property, because the determination of future earnings settles the value of the property involved in so far as the equities of the stockholders are concerned.

***Ecker et al. v. Western Pacific Railroad Corporation**, 318 U. S. 448; **Group of Institutional Investors et al. v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company**, 318 U. S. 523.

†**Northern Pacific Railroad Company v. Boyd**, 228 U. S. 482.

The statute requires that the value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present and prospective, and all other relevant facts. The Commission had before it the investment of the Debtor and its several corporations in road and equipment (Submission Pamphlet, Page 35), showing, as of December 31, 1935, a grand total of \$238,750,511. When the District Court approved the plan, additions and betterments during the trusteeship had been made to the properties at a cost of approximately \$40,000,000 (Submission Pamphlet, Page 195), and in determining the prospective earning power of the property, the Commission first found, for the combined properties, for the first five years, 1927-1932, available for interest, average earnings of \$8,103,881; a four-year average, 1932-1935, of \$3,606,921; and a three-year average, 1936-1938, of \$1,128,819.

Against this, the earnings of the combined properties available for interest during the following years were:

1942.....	\$17,044,420.39
1943.....	\$11,573,667.93
1944.....	\$10,617,416.48 (for the first 11 months only)

Under the finally approved Plan, fixed interest charges would approximate \$1,694,941; prior contingent interest charges, \$498,318; and contingent interest charges, \$1,364,133. Including the payments to sinking funds and the capital fund, the total to charges before dividends on the preferred stock would be \$4,584,689.

The value of the combined properties for the purposes of the proceeding was found by the Commission (Submission Pamphlet, Page 159) to be approximately \$155,173,127.

It appears that present earnings of the Debtor were given no effect in determining what might be the future earnings of the property, and that the four-year average, 1932-1935,

of \$3,606,921, formed the basis for the final conclusions of the Commission as to what the property could probably earn for the future.

This Court is asked to review this proceeding and determine whether—

Investments of the carrier in road and equipment, additions and betterments, during the period when the carrier is undergoing reorganization, and the present earnings of the carrier, may be given no effect in determining what a railroad property may reasonably be expected to earn for the future.

Question 2.

It is respectfully suggested that this Court should pass upon the question of whether past earnings of a railroad property undergoing reorganization, when such past earnings are brought about because of a national receding economy and depression, should be the determining factor in arriving at a conclusion as to the future earnings of such property.

During the years 1931 to 1939 a general depression occupied the field of industry and many stable corporations were unable, during that period, to earn their fixed charges.

The Plan formulated by the Commission and approved by the District Court proceeds upon the theory that while industry as a whole might entirely recover, railroads, when the present world war is over, will return to earnings available during depression years, and that the value of properties of railroads undergoing reorganization should be determined upon that basis.

Because of the fact that many railroads are now undergoing reorganization, it is regarded as essential that this Court determine what effect is to be given the earnings during these depression years in arriving at a conclusion as to the probable future earnings of such carriers.

Question 3.

Viewed solely from the standpoint of future earnings, it appears that the equities of the stockholders of the Debtor should not be found without value, when it appears that during periods of economic prosperity, the earnings of the Debtor will be sufficient to provide for prior claims and leave a surplus from which substantial amounts can be lawfully paid as dividends.

Subsection (b) of Section 77 of the Bankruptcy Act provides that a plan may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive or to subscribe for securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan.

If we eliminate from consideration the earnings of the property of the Debtor during the depression, and give effect only to earnings prior to such depression and subsequent thereto, it appears that it may not lawfully be found that the equities of the stockholders of the Debtor are entirely without value.

Should the estimated earnings prove to be substantially under the actual earnings, the injustice that will result to the stockholders of the Debtor is obvious.

It seems reasonable, therefore, to request this Court to pass upon the question of whether, in the light of apparent large earnings, the stockholders of the Debtor should be denied any participation in a plan of reorganization. Certainly, a large question is presented—whether such stockholders should not be permitted to have issued to them options or warrants to subscribe for stock in the new company upon such terms and conditions as may be found to be reasonable.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, to review the decrees of the United States Circuit Court of Appeals for the Tenth Circuit, entered on May 10, 1945, reversing orders of the District Court for the District of Colorado, approving and confirming a Plan of Reorganization under Section 77 of the Bankruptcy Act for The Denver and Rio Grande Western Railroad Company, Debtor, and The Denver and Salt Lake Western Railroad Company, Subsidiary Debtor. The decrees of said Circuit Court of Appeals sought to be reversed were entered in cases numbered on its docket, Nos. 2906, 2907, 3106, 3107, 3108, and entitled **In re: The Denver and Rio Grande Western Railroad Company, Debtor.**

Respectfully submitted,

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Dated August 1, 1945.